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No. 94-701

In the Supreme Court of the United States

OCTOBER TERM, 1994

WALTER B. NELSON AND MARY E. NELSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 7(g) of the National Trails System Act, 16 U.S.C. 1246(g), authorizes the Secretary of the Interior to utilize condemnation proceedings to acquire lands and interests in lands that "in his judgment" are "reasonably necessary" to provide trail passage across such lands. The question presented is whether the Secretary exceeded the scope of that authority or abused his discretion by condemning, for the Appalachian Trail, 16.03 acres formerly owned by petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 26 F.3d 349. The opinion of the district court (Pet. App. 30-34) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28-29) was entered on June 14, 1994. A petition for rehearing was denied on July 13, 1994. Pet. App. 26-27. The petition for a writ of certiorari was filed on October 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 7(g) of the National Trails System Act, 16 U.S.C. 1246(g), provides in pertinent part:

> The appropriate Secretary [of the Interior or Agriculture] may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands: *Provided*, That condemnation proceedings may not be utilized to acquire fee title or lesser interests to more than an average of one hundred and twenty-five acres per mile. * * *

STATEMENT

1. In 1968, Congress passed the National Trails System Act (the Trails Act or the Act), Pub. L. No. 90-543, 82 Stat. 919, codified at 16 U.S.C. 1241 *et seq.*, in an effort "to provide for the ever-increasing outdoor recreation needs of an expanding population and * * * to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation." 16 U.S.C. 1241(a). The Trails Act designates the Appalachian Trail (the Trail), extending approximately 2,000 miles along the Appalachian Mountains from Mount Katahdin, Maine, to Springer Mountain, Georgia, as a national scenic trail. 16 U.S.C. 1244(a)(1). The Trails Act vests primary responsibility for administering the Appalachian Trail in the Secretary of the Interior (the Secretary), in consultation with the Secretary of

Agriculture, 16 U.S.C. 1244(a)(1), and gives the Secretary the power to acquire lands by voluntary sales, exchanges of property, or condemnation. 16 U.S.C. 1246(e)-(g).

In 1978, Congress amended the Trails Act to (1) increase the amount of land the Secretary was authorized to acquire by condemnation to 125 acres per mile of trail; (2) allow acquisitions to include up to an average of 125 acres per mile of trail; and (3) expand the budget for land acquisitions from $5 million to $30 million for each of the fiscal years 1979 through 1981. National Trails System Act, Pub. L. No. 95-248, §§ 4, 5(a)(1), 92 Stat. 160 (codified as amended at 16 U.S.C. 1246(g), 1249(a)(1)). The 1978 amendments to the Act eliminated the requirement that the land taken be "the most direct or practicable connecting trail right-of-way," while retaining the requirement that the Secretary judge the condemnation to be "reasonably necessary to provide passage across such lands." Compare § 7(g), 82 Stat. 924, with § 4, 92 Stat. 160.

2. In 1983, the National Park Service entered into negotiations, pursuant to 16 U.S.C. 1246(g), to acquire 34.38 acres in Rutland County, Vermont, from petitioners. The Park Service determined that the acquisition was necessary to move the Trail from the roadside to a more suitable corridor, which would provide views and permanently protect the Trail. During negotiations, the Park Service reduced the amount of land it sought to 16.03 acres, but the parties failed to reach agreement on the purchase price. Pet. App. 5.

3. On September 7, 1990, the United States, on behalf of the Secretary, filed a complaint in condemnation to acquire fee title to the 16.03 acres. Pet. App. 55-59. The complaint averred that the public uses for which the land was taken were the "proper administration, preser-

vation, and development of the Appalachian National Scenic Trail for the benefit and enjoyment of the public." Pet. App. 56, ¶ 4.

Petitioners' answer raised five defenses. Pet. App. 36-50. First, they maintained that 4.46 of the acres were taken in fee instead of by easement as a result of the "bad faith, vindictive, arbitrary and capricious actions of administrative personnel" at the Appalachian National Trail Land Acquisition Office in West Virginia. *Id.* at 36-37, ¶ 1. In support of that allegation, petitioners noted that the acquisition office had originally negotiated a taking in fee of 11.57 acres and a taking by way of easement of 4.46 acres, and that the Government's proposed award of compensation was based on that arrangement. *Id.* at 37, ¶ 1.A, 1.B. In addition, petitioners alleged that the condemnation action seeking all 16.03 acres in fee was made to punish petitioners for refusing to accept the offered compensation. *Id.* at 37, ¶ 1.C. Second, petitioners asserted that the taking violated the Trails Act, 16 U.S.C. 1241 and 1246(g). Pet. App. 38, ¶ 2. Third, petitioners argued that the taking of 16.03 acres in fee violated the Fifth Amendment because, *inter alia*, the taking was not for a "public purpose" but rather was for the purpose of punishing petitioners. Pet. App. 38, ¶ 3. Fourth, petitioners asserted that the "condemnation of said 4.46 acres in fee, instead of by way of easement, is not necessary to comply with the intent and meaning of the applicable federal statute, but is wholly unnecessary to comply with the same." *Id.* at 38, ¶ 4. Fifth, petitioners alleged that the taking of the entire 16.03 acres "is far more acreage than 'is reasonably necessary to provide passage across' the lands of the defendants, and a much lesser taking * * * will provide a width of corridor for the trail where it now

exists which is wholly adequate 'to protect the integrity of the Tr[ai]l.'" *Id.* at 38-39, ¶ 5.

4. The district court held a bifurcated trial, first on the government's right to take the property, and then on the amount of just compensation. At the first hearing, petitioners took the position that the Park Service was entitled to acquire only 6.71 acres in fee simple. Gov't C.A. Br. 8. The government responded that the court could review the agency decision to condemn the 16.03 acres only to determine whether the condemnation was for a "public purpose" and to determine whether the Secretary had exceeded his authority under the Act's limitation of condemnation to an average of 125 acres per mile. *Ibid.*

The officer in charge of the Park Service land acquisition program for the Appalachian Trail, Donald T. King, testified that, under the Land Protection Plan prepared for the Trail (Pet. App. 60-67), the Park Service originally planned to acquire a 34-acre parcel from petitioners. Gov't C.A. Br. 8-9. King also testified that he would have accepted a compromise taking of 10.95 acres as a reasonable settlement of the controversy during the negotiation period. Pet. App. 86. He expressed the view that a 10.95-acre parcel would be adequate to protect the trail, but acknowledged that other experts could have different views on the appropriate amount of land to take. Gov't C.A. Br. 9.

5. The district court held that 16 U.S.C. 1246(g), which provides that the Secretary "shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands," means that the government "must attempt to take only the minimal interest in land that will accommodate the protection of the trail and passage across lands, having in mind a minimum impact on the landowner by the taking." Pet.

App. 33. The court placed the burden on the government to prove, by a preponderance of the evidence, that the 16.03 acres it sought were reasonably necessary for those purposes. *Ibid.* Then, concluding that the government failed to carry that burden, the court allowed the condemnation in fee of only 6.7 acres, and, in a subsequent trial, determined that the value of the 6.7 acres was $23,450. *Id.* at 25.

6. The court of appeals reversed. Pet. App. 1-24. It held that a court considering a challenge to a condemnation decision by the Secretary should determine "whether the delegated officials acted in conformity with their legislative grant of authority" and whether the manner in which the Secretary exercised that authority was arbitrary, capricious, or in bad faith. *Id.* at 14. The court of appeals explained that under the latter standard, a reviewing court may not substitute its judgment for that of the Secretary, but rather may determine only whether the Secretary based his decision on a consideration of the relevant statutory factors, and may set aside the decision only if his conduct was so egregious that the taking can serve no public use. *Id.* at 15.

In this case, the court noted that the broad discretion granted to the Secretary by 16 U.S.C. 1246(g) to acquire property is limited by three specific factors. The Secretary must engage in negotiations with the landowner prior to filing condemnation proceedings; he may acquire only such title as, in his judgment, is reasonably necessary to provide passage; and he may condemn an average of only 125 acres per mile. Pet. App. 16-18.

Reviewing the Secretary's decision against those limitations, the court of appeals held that the district court had erroneously relied on the opinions and testimony of the landowners and the government's

witness in making its determination of whether the condemnation of 16.03 acres in fee was reasonably necessary to protect the trail, rather than reviewing the Secretary's decision to acquire the 16.03 acres to determine whether he had abused his discretion. Pet. App. 22-24. Because nothing in the record suggested that the Secretary violated the statutory guidelines in Section 1246(g), the court held that the decision to condemn 16.03 acres in fee was proper. *Id.* at 24. Accordingly, the court of appeals remanded the case for the district court to determine the amount of just compensation for the property the United States had lawfully sought to condemn. *Ibid.*

ARGUMENT

The court of appeals correctly held that the Secretary of the Interior did not abuse his discretion in deciding to acquire 16.03 acres of land in fee from petitioners for the Appalachian Trail. That fact-bound decision does not warrant review.

1. Petitioners are correct that "the Act is neither silent nor ambiguous regarding what land can be condemned by the Secretary for use of the Trail." Pet. 11. Under 16 U.S.C. 1246(g), the Secretary is authorized to acquire "only such title as, in his judgment, is reasonably necessary to provide passage across such lands." The language "only such title as * * * is reasonably necessary to provide passage" establishes the boundaries of the Secretary's takings authority. The phrase "in his judgment" modifies that language, explaining how that determination is to be made. Compare, *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988). The text of the Act thus expressly commits the determination of what lands and title are "reasonably necessary" to the judgment and discretion of the

Secretary. The court of appeals properly held that the Secretary's decision is reviewable only for abuse of discretion and that no such abuse was committed here. Pet. App. 14-15, 22-26.

2. There can be no doubt that the 16.03 acres have been taken for a public use. Petitioners' reliance (Pet. 12) on *Cincinnati* v. *Vester*, 281 U.S. 439 (1930), for the proposition that "[t]he condemnation of a private person's land should not be sustained on a 'bare recital' that such land needs to be taken" is misplaced. In *Vester*, a landowner challenged the City of Cincinnati's condemnation of an allegedly excessive amount of land on the ground that the taking was not accomplished in accordance with the applicable provisions of the Constitution and statutes of Ohio. This Court understood it to be "the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed," and concluded that the City had failed to specify the public purpose of the excess appropriation at issue, as required by state law. 281 U.S. at 448. This case, unlike *Vester*, raises a question of federal law. Congress has defined the public purpose justifying the acquisition of property for the Appalachian Trail pursuant to the Trails Act, and has entrusted the Secretary with the responsibility to implement that purpose.

Determinations of public use and the applicable standard of review were examined further in *United States ex rel. TVA* v. *Welch*, 327 U.S. 546 (1946). Sustaining the Tennessee Valley Authority's authority to condemn six tracts of land that were flooded when the Fontana dam was built, this Court wrote: "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized

to do the taking may do so to the full extent of its statutory authority." 327 U.S. at 551-552. Because "Congress authorized the Authority to acquire, hold, and use the lands to carry out the purposes of the T.V.A. Act," the Court held that the TVA took the six tracts at issue for a public purpose. *Id.* at 552. The TVA Act contains a provision empowering the TVA to condemn "all property that it deems necessary for carrying out the purposes of the Act." See 16 U.S.C. 831c(i) and 831x. As in the instant case, Congress explicitly committed the decision regarding what lands are necessary for those purposes to the discretion of the agency charged with administering the Act. This Court has since explained that *Welch* stands for the proposition that "[t]he role of the judiciary in determining whether [the power of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

3. After a reviewing court has established that a taking has been made for a public purpose, any further review of the particulars of the agency's decision must be based on limitations in the language of the particular enabling statute. In this case, 16 U.S.C. 1246(g) requires only that the Secretary engage in negotiations prior to initiating condemnation proceedings; that he condemn only an average of 125 acres per mile; and that he acquire only such title as, in his judgment, is reasonably necessary to provide passage. Only the last consideration is at issue here. "The adjudicated cases * * * establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such

use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." *Shoemaker* v. *United States*, 147 U.S. 282, 298 (1893). See also *United States* v. *Gettysburg Elec. Ry.*, 160 U.S. 668, 685 (1896) ("The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question."). As this Court admonished in *Berman* v. *Parker*, 348 U.S. at 35-36:

> The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. * * *
>
> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*

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* *Berman*, like the instant case, involved a statute that committed condemnation authority to the discretion of an agency, unlimited by any requirement other than the public purpose defined by the statute. Both the Act at issue in *Berman* and 16 U.S.C. 1246(g) were discussed in *United States* v. *18.67 Acres of Land*, 793 F. Supp. 582 (M.D. Pa. 1992), which considered a challenge to a condemnation accomplished pursuant to the Act of Feb. 11, 1895, ch. 80, § 1, 28 Stat. 44, 16 U.S.C. 430g (Gettysburg Act), which involved the Gettysburg National Military Park. The court held that given the "public use and the specific congressional approval for the taking of property within the Park boundary, this court has no jurisdiction to review the Secretary's decision that the 18.67 acre * * * tract is necessary for the administration, preservation and development of the Park." *18.67 Acres of Land*, 793 F. Supp. at 586.

Consequently, petitioners' contention (Pet. 15) that "[t]he courts cannot simply acquiesce to the government's unsupported assertion that a certain parcel of land is necessary for the trail," is wide of the mark. Because the taking here is unquestionably for a public purpose, the court of appeals properly deferred to the Secretary's judgment, exercised pursuant to express delegation by Congress, regarding the acquisition of title reasonably necessary to provide passage across petitioners' land.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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The court determined, however, that it could review the Secretary's decision to take a fee simple interest rather than some lesser interest in the land. A provision of the Gettysburg Act instructs that "the Secretary shall acquire the minimum Federal interests necessary to achieve the objectives identified for specific areas and the park." 16 U.S.C. 430g-5(a) (Supp. V 1993). The court distinguished Section 430g-5 of the Gettysburg Act from 16 U.S.C. 1246(g), at issue here, noting that the "in his judgment" language of the Trails Act constitutes "an express delegation of discretionary decision-making power to the Secretary." *18.67 Acres of Land*, 793 F. Supp. at 587. The court also distinguished the Act at issue in *Berman* as one that "contained no limiting language such as that contained in 16 U.S.C. § 430g-5(a)." 793 F. Supp. at 588.